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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1943**

**JEROME M. NER**

*Petitioner*

**v.**

**No.**

**657**

**UNITED STATES OF AMERICA**

*Respondent*

**PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT**

**AND**

**BRIEF IN SUPPORT OF PETITION FOR WRIT**

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## SUBJECT INDEX

|  | Page |
|--|------|
| PETITION FOR WRIT OF CERTIORARI  |      |
| SUMMARY STATEMENT OF THE MATTERS INVOLVED .....  | 1    |
| (a) Decisions of <i>District</i> <del>Tax</del> Court and United States Court of Appeals ..... | 6    |
| JURISDICTION .....   | 7    |
| QUESTIONS PRESENTED .....  | 8    |
| REASONS RELIED UPON FOR ALLOWANCE OF WRIT .....  | 9    |
| PRAYER .....   | 10   |
| BRIEF IN SUPPORT OF PETITION   |      |
| I. OPINIONS OF THE COURTS BELOW .....  | 12   |
| II. JURISDICTION .....   | 12   |
| III. STATEMENT OF THE CASE .....   | 13   |
| IV. SPECIFICATIONS OF ERROR .....  | 13   |
| V. ARGUMENT .....  | 15   |
| (a) OUTLINE OF ARGUMENT AND AUTHORITIES .....  | 15   |
| (b) ARGUMENT AND DISCUSSION OF AUTHORITIES .....   | 18   |
| I. The Deductions are Allowable Under Section 23(a)(1)(A) Internal Revenue Code .....          | 18   |

## INDEX—(Continued)

|   | Page |
|---|------|
| A. The Expense Was A Reasonable and Necessary Travelling Expense .....  | 18   |
| B. The Expenses Were Incurred While Away From Home .....  | 19   |
| C. The Expenses Were Made in Pursuit of Business .....  | 21   |
| (1) The Double Business Cases Sustain the Deduction .....   | 21   |
| (2) The Flowers Case is Distinguishable .....   | 24   |
| D. The Distinction Between "Temporary" and "Indeterminate" Is Unsound .....   | 29   |
| (1) Even if the Employment was "Indeterminate" Rather Than "Temporary", Petitioner's Expenses While Employment Was Temporary and Until It Became Indeterminate Are Deductible ..... | 32   |
| E. Whether The Requirements of Section 23(a)(1)(A) Have Been Met, Under Undisputed Evidence, Is A Question of Law .....   | 34   |
| II. The Deductions are Allowable Under Section 23(a)(2) Internal Revenue Code .....   | 35   |
| VI. CONCLUSION .....  | 36   |

## LIST OF AUTHORITIES

|   |        |
|---|--------|
| Bark v. Commissioner, 6 T.C. 851 .....                                | 24, 29 |
| Barnhill v. Commissioner, 148 Fed. (2d) 913,<br>159 A.L.R. 1210 ..... | 9, 19  |
| Baumgartner v. United States, 322 U.S. 665, 671 .....                 | 35     |

# **INDEX—(Continued)**

|   | Page             |
|---|------------------|
| Mort L. Bixler v. Commissioner, 5 B.T.A. 1181 .....   | 19, 21           |
| Bogardus v. Commissioner, 302 U.S. 34; 82 L. Ed. 32 .....   | 34               |
| Bowles v. United States, 319 U.S. 33 .....  | 13               |
| Walter F. Brown, 13 B.T.A. 833 (1928) .....   | 22               |
| Coburn v. Commissioner, 138 Fed. (2d) 736;<br>31 A.F.T.R. 827 (1943) .....  | 9, 19            |
| Commissioner v. Flowers, 326 U.S. 465; 148 Fed. (2d) 163;<br>33 A.F.T.R. 899 (1945); 34 A.F.T.R. 301;<br>Ct. D. 1659; CB 1946-1, 57 ..... | 6, 9, 13, 18, 20 |
| Connecticut Ry. & Lighting Co. v. Palmer, 305 U.S. 493 .....  | 13               |
| Exmoor Country Club v. United States, 119 Fed. (2d) 961 .....   | 35               |
| Flowers v. Commissioner, 326 U.S. 465;<br>148 Fed. (2d) 163 (1945) .....  | 12, 19           |
| Chester D. Griesemer, 10 B.T.A. 386 .....   | 19, 28           |
| Helvering v. Rankin, 295 U.S. 123, 79 L. Ed. 1343 .....   | 35               |
| D. C. Jackling, 9 B.T.A. 312 (1927) .....   | 21               |
| Johnson v. Commissioner, 8 T.C. 303 .....   | 24, 29           |
| Kaufman v. Commissioner, 44 Fed. (2d) 144 .....   | 34               |
| MacDonald v. Commissioner, 323 U.S. 57; 89 Law Ed. 68 .....   | 35               |
| Donald B. McCruden, 1938 Memo. B.T.A. Decisions 109,<br>P-H 39068 (1938) .....  | 23               |

# **INDEX—(Continued)**

|   | Page  |
|---|-------|
| S.M.R. O'Hara, 6 T.C. 841 .....   | 19    |
| Joseph W. Powell, 34 B.T.A. 655 .....   | 22    |
| Prentice-Hall, PP 76,129 .....  | 20    |
| Rogers Estate v. Helvering, 320 U.S. 410 .....  | 12    |
| Harry F. Schurer, 3 T.S. 544, 1944 .....  | 29    |
| United States v. Miller, 317 U.S. 69 .....  | 13    |
| United States Fidelity & Guaranty Co. v. Wyer,<br>60 Fed. (2d) 856, cer. den. Wyer v. United States<br>Fidelity & Guaranty Co., 287 U.S. 647; 77 L. Ed. 560 ..... | 34    |
| Pugh v. United States, 10 Ct. Cl. 274, aff. United States v.<br>Pugh, 99 U.S. 285; 25 L. Ed. 322 .....  | 34    |
| Wallace v. Commissioner, 144 Fed. (2d) 407;<br>32 A.F.T.R. 1209 (1944) .....  | 9, 19 |
| Warner v. Walsh, Collector of Internal Revenue,<br>6 A.F.T.R. 574; 24 Fed. (2d) 449 .....   | 28    |
| Wunderle v. McCaughan, 38 Fed. (2d) 258 .....   | 28    |
| <b>Other Authorities:</b>   |       |
| I.T. 3842, 1947-5-12497 .....   | 20    |

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

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JEROME M. NEY ..... *Petitioner*

v.

No. ....

UNITED STATES OF AMERICA ..... *Respondent*

---

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR  
THE EIGHTH CIRCUIT

AND

BRIEF IN SUPPORT OF PETITION FOR WRIT

---

*To the Honorable Court of the United States:*

Petitioner, Jerome M. Ney, respectfully shows:

SUMMARY STATEMENT OF THE  
MATTERS INVOLVED

This case involves the propriety of deduction of certain expenses from the gross income of the Petitioner here, sometimes hereinafter referred to as Plaintiff.

The applicable statute is as follows:

"Sec. 23. DEDUCTIONS FROM GROSS INCOME . . . . .

"In computing net income there shall be allowed as deductions:

"(a) Expenses.

"(1) Trade or Business Expenses.

"(A) In General. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity." . . . . .

"(2) Non-Trade or Non-Business Expenses.

"In the case of an individual, all the ordinary and necessary expenses paid or incurred during the taxable year for the production of collection of income, or for the management, conservation, or maintenance of property held for the production of income."

The facts briefly are as follows:

The Petitioner, sometimes referred to as Plaintiff, Mr. Jerome M. Ney, had been, since June 1, 1936, President and

General Manager of the Boston Store Dry Goods Company, which operates retail dry goods stores with a wholly owned subsidiary in Texas (Rosenthal's). Mr. Ney has been a resident of Fort Smith, Arkansas, for forty-one years (R.17). He is married, with two children (R.17-18).

He accepted a position with the Office of Price Administration at Atlanta in July, 1942, to prepare for the rationing of various commodities, with the distinct understanding with the Regional Administrator that the job would take only three or four months, and that he could be free to maintain full contact with his business (R.18-19).

In the latter part of October, this job was completed and he was asked to stay on, and he did stay on for the Office of Price Administration in Washington, to assist in shoe rationing. This assignment was again taken for a few months, and in fact ended February 7, 1943. He was again asked to stay on to prepare a clothing rationing program (R.19-20-21).

He became Director of the Miscellaneous Production Rationing Division. Then he became Assistant Deputy Administrator for Rationing. Then he was Director of the Consumer Job Division. In July, 1945, he was ready to leave when the then Deputy Administrator of the Price Department became ill and he took his position until December, 1945 (R.21-22).

All of the above positions were purely temporary assignments within a particular field, it being clearly understood both by Mr. Ney and his employer that each assignment was to last only three or four months, and that he

was fully free to maintain personal contact with his business (R.21).

During his entire tenure with the Office of Price Administration he continued as before to direct merchandising, financing and the executive personnel of the stores by telephone, telegraph, return trips to Fort Smith every six or seven weeks for about four days, by spending weekends with his chief executives and with buyers in their monthly trips to the market and by having them come to him in Washington, many conferences taking place in his hotel rooms, also used by them overnight, all in pursuit of business for his company (R.22-23-24). As stated by Mr. Ney (R.27): "During the period of my association with the government my duties in connection with my position at the Boston Store were constant, in other words, I did not relinquish, relegate or delegate any of the duties and obligations of General Manager".

Even before his employment by the Office of Price Administration, Mr. Ney spent fifty percent of his time away from Fort Smith in various markets, principally in New York, in prosecuting the business of the Boston Store (R.23).

The hotel rooms he stayed in, and the hotel itself, was advantageous as an office to serve both his Fort Smith and Government business. There was not a night or a meal that he was not in conference either for the Government or his own business (R.26).

Petitioner continued to receive a salary from his private business as well as a salary for his work with the Of-

fice of Price Administration, the salaries earned being as follows:

|                    | 1942        | 1943        | 1944        |
|--------------------|-------------|-------------|-------------|
| Boston Store ..... | \$14,550.00 | \$19,150.00 | \$16,550.00 |
| Rosenthal's .....  | 3,775.00    | 2,525.00    | 3,900.00    |
| O. P. A. ....      | 2,162.79    | 5,563.50    | 7,829.15    |

(R.26-27, joint exhibits 1-2-3, at pages 39, 53 and 63.)

In his returns, reflected by the above exhibits, Petitioner claimed deductions, which were allowed, from the income received from his private business, for money spent for entertainment, travel and telephone for all three years as follows: 1942—\$910.00; 1943—\$1,080.00; and 1944—\$1,032.50. These sums were spent at places other than Washington and were not part of the sums sued on.

Petitioner's work for the Boston Store was and is his principal lifetime work (R.28).

Respondent conceded that the amounts claimed expended were in fact expended but denied the right to the deduction (R.24, 25).

The Complaint (R.2-7) alleged that the Petitioner was entitled to deduct, under Sections 23(a) of the Internal Revenue Code, expenses of meals, lodging and incidentals for the years 1942, 1943 and 1944, in the respective amounts of \$1,720.00, \$5,200.00 and \$5,200.00; that having failed to take these expenses as deductions in his return, Petitioner had duly filed claims for refund, and, these having been disallowed, this suit was filed to recover

\$4,823.40\*, overpayment of income taxes resulting therefrom.

The Answer admits virtually all of the allegations of the Complaint but denies liability (R.8, 9).

*Decisions of District Court and  
United States Court of Appeals*

The District Court entered judgment dismissing the complaint (R.15) separately making findings of fact and conclusions of law (R.11, 12, 13, 14 and 15).

The testimony was entirely uncontroverted, and the findings made by the Court were in full accord with the allegations of the complaint and the testimony, except that the Court found that although Petitioner's business with the Office of Price Administration was originally temporary it became indeterminate (R.13). The Court concluded that the case was governed by *Commissioner v. Flowers*, 326 U.S. 465 (R.14).

Upon appeal, the Court of Appeals affirmed (R. 122), also basing its decision primarily upon the Flowers case (R.112-121). The Court held that Petitioner's "home" (within the statute) was first in Atlanta and then in Washington; that the expenses were not incurred in pursuit of his Fort Smith business; that his Atlanta-Washington employment was not temporary; and that the so-called "double business" cases (hereinafter referred to) did not lead to a contrary decision.

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\* \$1,514.94 for 1942 and 1943 and \$3,308.46 for 1944. Since 1942 taxes were "forgiven", although used as a basis for computing 1943 tax, these years are properly treated together. This, of course, is conceded by the Government (R.16, 17).

The appellate court did not pass upon the propriety of the deduction under Section 23(a)(2), although raised by Petitioner in his brief and upon appeal (R.104).

No petition for rehearing was filed.

### JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C.A., Section 347.

In this cause, final judgment was rendered by the United States Court of Appeals for the Eighth Circuit on December 24, 1948 (R.122), affirming the judgment of the District Court of the United States, Western District of Arkansas, dismissing the complaint of Petitioner (R. 15). The complaint was an action by petitioner against the United States arising under the Revenue Laws of the United States (28 U.S.C.A. 41 [20]) for the sum of \$4,823.40, income taxes erroneously and illegally assessed by the then Collector of Internal Revenue for the District of Arkansas (who was no longer Collector when the suit was filed) with respect to calendar years 1942, 1943 and 1944, claims for refund having been duly and timely filed and disallowed (Joint Exhibits 4, 5 and 6, R.16-17, R.77-101).

No petition for rehearing was filed.

The decision of the trial court is reported in 77 Fed. Suppl. 1005. The decision of the Court of Appeals has been reported in 171 F. (2d) 449.

All of the "Questions Presented" as herein next shown were properly raised on appeal to and brief in the Circuit Court of Appeals.

The grounds upon which it is contended that this Court should grant the writ herein are listed under "Reasons Relied upon for the Allowance of the Writ".

### QUESTIONS PRESENTED

(1) Whether or not under undisputed evidence, a taxpayer who lived and maintained his permanent home and family in Fort Smith, Arkansas, where he for years had been (and continued to be) President and General Manager of a corporation which operated department stores and retail dry goods stores, who accepted a position in July, 1942, with the Office of Price Administration first in Atlanta, Georgia (and then in Washington, D. C.), believing the employment was to be of short duration, but who was induced to stay for additional specific assignments until December, 1945, living as an employed transient in Washington hotels, and who continued to draw his salary from his Fort Smith business and perform his duties with respect thereto by telegram, telephone, by having his chief executives come to him (reserving an extra hotel bed for that purpose) and by personally returning to Fort Smith every six or seven weeks for four or five days, is entitled to deduct from gross income for 1942, 1943 and 1944, or any of those years, the amounts for any part thereof expended by him for meals, hotel rooms and incidentals in Atlanta and Washington as a business expense under Section 23(a)(1)(A) of the Internal Revenue Code:

(2) Whether under the above Statement of Facts the taxpayer is entitled to deduct such expenses for 1942, 1943 and 1944, or any of those years, as a non-business expense under Section 23(a)(2) of the Internal Revenue Code.

## REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

(1) In deciding the first question presented, the United States Court of Appeals has given a judicial construction to the word "home" within the meaning of the statute (Sec. 23(a)(1)(A)) in conflict with the construction given it by the 9th Circuit in *Wallace v. Commissioner*, 144 Fed. (2d) 407, 32 A.F.T.R. 1209 (1944), by the 2nd Circuit in *Coburn v. Commissioner*, 138 Fed. (2d) 736, 31 A.F.T.R. 827 (1943) and by the 5th Circuit in *Commissioner v. Flowers*, 148 Fed. (2d) 163, 33 A.F.T.R. 899 (1945), although in accord with the 4th Circuit in *Barnhill v. Commissioner*, 148 Fed. (2d) 913, 159 A.L.R. 1210. This 159 A.L.R. 1210. This question was specifically left unquestioned was specifically left undecided by this Court in *Commissioner v. Flowers*, 326 U.S. 465, 34 A.F.T.R. 301.

(2) In deciding the first question presented, it is believed that the United States Court of Appeals misconstrued the applicability of the *Flowers* case, particularly with reference to the double-business type of situation.

(3) In deciding the first question presented, the United States Court of Appeals has misconstrued the double business doctrine (recognized by the *Barnhill* case and many Tax Court cases) and has accordingly erroneously decided an important question of Federal Law which should be settled by this Court.

(4) In deciding the first question presented, it is believed that the United States Court of Appeals ignored the effect of the originally temporary nature of even indeterminate employment and thus erroneously decided an im-

portant question of Federal Law which should be settled by this Court.

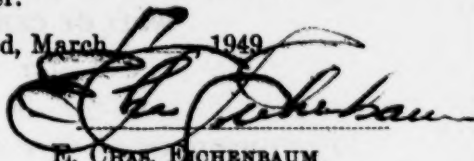
(5) In ignoring the second question presented, it is believed that the United States Court of Appeals has rendered a decision which ignores the effect of the decision rendered by this Court in *McDonald v. Commissioner*, 323 U.S. 57, 89 Law Edition 68.

(6) All of the questions presented and decided are questions of importance in Federal Income tax law and should be settled by this Court.

Wherefore, your petitioner prays that writ of certiorari issue under the seal of this Court, directed to the United States Court of Appeals for the Eighth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings of the said court had in the case numbered and entitled on its docket No. 13770, *Jerome M. Ney, Appellant v. United States of America, Appellee*, to the end that this cause may be reviewed and determined by this Court, as provided by the statutes of the United States, and that the judgment herein in the Court of Appeals be reversed by this Court, with direction that Judgment be rendered in

favor of the petitioner; and for such further relief as to this Court may seem proper.

Dated, March 1949



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**BRIEF IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI**

I

**OPINIONS OF THE COURTS BELOW**

The opinion of the Trial Court was published in 77 Fed. Suppl. 1005 (R.10-15).

The decision of the Court of Appeals has not been reported in 171 Fed. (2d) 449. It is found in the Record at pages 112-121.

II

**JURISDICTION**

A detailed statement with reference to the jurisdiction of this Court is found under corresponding caption in the petition, page 7 hereof, and a statement of the reasons relied upon for allowance of the writ is also set forth in the petition, pages 9 to 11, to both of which reference is hereby made.

The following are cases granting certiorari because of conflict of decisions of United States Courts of Appeals:

*Flowers v. Commissioner*, 326 U.S. 465;

*Rogers Estate v. Helvering*, 320 U.S. 410.

The following are cases granting certiorari because the United States Court of Appeals decided an important question of Federal Law which should be but has not been settled by this Court:

*Rogers Estate v. Helvering*, *supra*;

*Connecticut Ry. & Lighting Co. v. Palmer*, 305 U.S. 493;

*Bowles v. U. S.*, 319 U.S. 33.

The following cases granted certiorari because of probable conflict with earlier decisions of this Court:

*U. S. v. Miller*, 317 U.S. 69.

### III

#### STATEMENT OF THE CASE

A statement of all matters material to the controversy under "Summary Statement of Matters Involved" (*ante*, pages 1 to 7) which is here adopted and made a part of this brief.

### IV

#### SPECIFICATIONS OF ERROR

(1) The Court of Appeals erred in holding that the "controlling authority touching this question is the case of *Commissioner v. Flowers*, 326 U.S. 465".

(2) The Court of Appeals erred in holding that the expense "was not, therefore, an expense incident to travel; neither can it be said that the claim is for expenses incurred while away from home".

(3) The Court of Appeals erred in holding that the expenses " . . . . . were in fact personal living expenses incurred at his principal place of employment."

(4) The Court of Appeals erred in holding, despite undisputed evidence, that the existence of conditions necessary to sustain the requirements of Section 23(a)(1)(A) was a question of fact.

(5) The Court of Appeals erred in holding that " . . . . . Plaintiff's place of business in Washington, D.C., was in effect found by the trial court to be his home and we cannot say that the finding is clearly erroneous."

(6) The Court of Appeals erred in holding that "Neither do we think the expenditures can be said to have been incurred by Plaintiff while away from home within the meaning of Section 23(a)(1)(A). They are personal and living expenses and not business expenses."

(7) The Court of Appeals erred in holding that "For the years here in question Plaintiff's principal activity was carried on at his business of duty in Atlanta or Washington."

(8) The Court of Appeals erred in holding that "The 'double business doctrine' as applied to the facts and circumstances in this case finds no support in the decisions of the Tax Court."

(9) The Court of Appeals erred in holding that " . . . . . the trial court found that Plaintiff's employment was for an indefinite period and we think the evidence supports that finding."

(10) The Court of Appeals erred in holding that " . . . . . the employment could not properly be classified as temporary within the meaning of the statute" (23(a)(1)(A).)

(11) The Court of Appeals erred in holding that " . . . . . regardless of how many so-called places of business Plaintiff had during the time in question the deductions claimed were his personal living expenses and hence are not deductible."

## ARGUMENT

## A. OUTLINE OF ARGUMENT AND AUTHORITIES

I. *The Deductions are Allowable under Section  
23(a)(1)(A) Internal Revenue Code*

*Commissioner v. Flowers*, 26 U.S. 465.

A. *The Expense Was a Reasonable and Necessary  
Travelling Expense*

*Chester D. Griesemer*, 10 B.T.A. 386.

B. *The Expenses Were Incurred While Away  
From Home*

*Wallace v. Commissioner*, 144 Fed. (2d) 407, 1944;

*Coburn v. Commissioner*, 138 Fed (2d) 736, 1943;

*Flowers v. Commissioner*, 148 Fed. (2d) 163, 1945;

*Barnhill v. Commissioner*, 148 Fed. (2d) 913;

*Mort L. Bixler*, 5 B.T.A. 1181;

*S. M. R. O'Hara*, 6 T.C. 841;

I.T. 3842, 1945-5-12497 (appearing also in Prentice-Hall 1947 PP. 76129);

*Commissioner v. J. N. Flowers*, 326 U.S. 465, Ct. D. 1659, CB 1946-1, 57.

c. *The Expenses Were Made in Pursuit of Business*

(1) *The Double Business Cases Sustain  
the Deduction*

*Mort L. Bixler*, 5 B.T.A. 1181;

*Walter F. Brown*, 13 B.T.A. 833 (1928);

*D. C. Jackling*, 9 B.T.A. 312 (1927);

*Joseph W. Powell*, 34 B.T.A. 655;

*Donald B. McCrudden*, 1938 Memo. B.T.A. Decisions  
109 (P-H 39068) (1938);

*S. M. R. O'Hara*, 6 T.C. 841;

*Bark v. Commissioner*, 6 T.C. 851;

*Johnson v. Commissioner*, 8 T.C. 303.

(2) *The Flowers Case is Distinguishable*

*Warner v. Walsh, Collector of Internal Revenue*, 6  
A.F.T.R. 574, 24 Fed. (2d) 449;

*Wunderle v. McCaughan*, 38 Fed. (2d) 258;

*Chester D. Griesemer*, 10 B.T.A., 386 (?).

d. *The Distinction Between "Temporary" and  
"Indeterminate" is Unsound*

*Harry F. Schurer*, 3 T.C. 544, 1944;

*Arnold P. Bark*, 6 T.C. 851;

*John T. Johnson*, 8 T.C. 303.

- (1) *Even if the Employment was "Indeterminate" Rather than "Temporary" Petitioner's Expenses While His Employment Was Temporary and Until it Became Indeterminate are Deductible*

*Arnold P. Bark*, 6 T.C. 851.

- E. *Whether the Requirements of Section 23(a)(1)(A) Have Been Met, Under Undisputed Evidence, is a Question of Law*

*U. S. Fidelity and Guaranty Company v. Wyer*, 60 Fed. (2d) 856;

*Cer. Den. Wyer v. U. S. Fidelity and Guaranty Company*, 287 U.S. 647, 77 L. Ed. 560;

*Kaufman v. Commissioner*, 44 Fed. (2d) 144;

*U. S. v. Pugh*, 99 U.S. 265, 25 L. Ed. 322, aff. *Pugh v. U. S.*, 10 Ct. Cl. 274;

*Baumgartner v. U. S.*, 322 U.S. 665, 671;

*Exmoor Country Club v. U. S.*, 119 Fed (2d) 961;

*Bogardus v. Commissioner*, 302 U.S. 34, 82 L. Ed. 32;

*Helvering v. Rankin*, 295 U.S. 123, 79 L. Ed. 1343.

- II. *The Deductions are Allowable under Section 23(a)(2) Internal Revenue Code*

*McDonald v. Commissioner*, 323 U.S. 57.

## ARGUMENT AND DISCUSSION OF AUTHORITIES

### 1 *The Deductions Are Allowable under Section 23(a)(1)(A) Internal Revenue Code*

Primarily, the decision of the trial court and the Circuit Court of Appeals rests upon *Commissioner v. Flowers*, 26 U.S. 465. We believe that all of the requirements of the *Flowers* case are met when the undisputed facts, as here, show a taxpayer engaged in earning income away from his permanent home and place of business.

#### A. *The Expense Was a Reasonable and Necessary Travelling Expense*

We think expense was "reasonable and necessary". Although stated as a separate requirement in the *Flowers* case, such requirement is, we believe, primarily a corollary of the third condition, "pursuit of business". Even the Government does not question the amount expended (R.24) and we think that in fact the sums were reasonable in amount and necessary if they were in fact expended in pursuit of business. Both the trial court and the Court of Appeals seemed to assume that this was true and accordingly we dispense with further comment with respect thereto.

However, it has been intimated that this was not a "travel" expense, primarily on the theory that it was a "living" expense, an argument which directly begs the question involved. A person may enjoy a travel status although he is stationed more or less indefinitely in one fixed place, and his "living" expense (if other requirements are met) accordingly become travel expense. The

same food which a taxpayer might eat in a local restaurant becomes a travel expense when eaten away from home in pursuit of business. In *Chester D. Griesemer*, 10 B.T.A. 386, deductions were allowed for amounts paid for an apartment in Paris, France, for three years, Griesemer being there on business for his firm. The Court said:

"Simply because the amounts in question happen to be 'living' expenses in a strict sense does not prevent them from being deductible if they are ordinary and necessary and are shown to have been incurred in carrying on his trade or business and are clearly in addition to his living expenses at the usual place of abode which he maintains for his mother and sister."

#### B. *The Expenses Were Incurred While Away From Home*

The 9th Circuit (*Wallace v. Commissioner*, 144 Fed. (2d) 407, 1944), the 2nd Circuit (*Coburn v. Commissioner*, 138 Fed. (2d) 736, 1943), and the 5th Circuit (*Flowers v. Commissioner*, 148 Fed. (2d) 163, 1945) have held that "home" means "home", i.e. place of residence. The Court below and the 4th Circuit (*Barnhill v. Commissioner*, 148 Fed. (2d) 913) as well as the Tax Court (Mort L. Bixler, 5 B.T.A. 1181, S.M.R. O'Hara, 6 T.C. 841, and cases cited therein) have construed "home" to mean "place of duty, business, or station". This Court specifically refused to pass on that point in the *Flowers* case.

There is nothing in the statute that gives the word "home" any unusual or extraordinary meaning, and we are constrained to submit that such a view is a correct one. As a matter of fact, we suggest that in designating "home" to be "place of duty" the Tax Court and the Cir-

cuit Courts of Appeals following their viewpoint were really stating in another way that in the particular situation involved "pursuit of business" had not been met.

In any event, Petitioner contends that during the taxable years his principal place of business (and accordingly his "home", even in a special tax sense) was Fort Smith, Arkansas. From it he received the far greater portion of his income; that was the business which was more important to him and to which he was the more important; he continued to direct that business and discharge his duties, although not always physically present; he not only always intended to return to it but in fact never left it.

Time is not the only element determining principal place of business. In I.T. 3842, 1947-5-12497 (appearing also in Prentice-Hall 1947 PP. 76129) it is stated: "In this connection, it might be noted that although the time element is generally one of the more important factors in determining whether a particular location constitutes an individual's principal or minor place of business, it should not of itself be regarded as controlling. (See *Commissioner v. J. N. Flowers*, 326 U.S. 465 Ct. D. 1659, CB 1946-1,57.) Thus, the mere fact that a State legislator in an unusual year has to spend more than six months at the State capitol does not automatically convert what is normally his minor place of business into his principal place of business for that particular year . . . . .".

Note also that the Tax Court in the O'Hara case, *infra*, relied heavily on the fact that most of the income was derived from the principal place of business.

*c. The Expenses Were Made in Pursuit of Business*

In this point lies the crux of this case.

If a taxpayer having one permanent place of business and home is forced, in pursuit of other income, to expend money for meals and lodging in hotels at a point distant from such permanent place of business and home, such expenses are in pursuit of business. This is true whether such additional income derives from temporary or indeterminate employment, for in either event moneys spent in earning such income can only be deemed expenses in pursuit of such business.

*(1) The Double Business Cases Sustain the Deduction*

Mort L. Bixler, 5 B.T.A. 1181, was the fountain-head of the Tax Court's "home means post of duty" doctrine. The taxpayer lived at Mobile, Alabama, but worked first at Hammond, Louisiana, and then at Houston, Texas. The petitioner attempted to deduct his living expenses at Hammond and Houston but the Court disallowed them. Attention is here called to the fact that Bixler, like Flowers, was attempting to deduct living expenses at his sole business away from his family home.

Despite the Bixler case, however, the Tax Court consistently thereafter allowed the deduction to the double business taxpayer. In D. C. Jackling, 9 B.T.A. 312 (1927) petitioner was a mine operator and metallurgical engineer. He had control and direction of many copper companies and was interested in mining operations in various parts of the United States, Mexico and South America. In 1918 he continued his private business but at the request of the Secretary of War took charge of construction of two plants for manufacturing explosives in West Virginia and

Tennessee. The Tennessee Plant was turned over to another party but petitioner continued to supervise the West Virginia plant. He was paid \$1.00 per year and was allowed 5 cents a mile and \$5.00 per day for traveling expenses and subsistence respectively. He spent \$29,151.37 for which he was not reimbursed. The Court held:

"The evidence clearly shows that these expenditures were made by the petitioner in furtherance of and because of the work he was doing for the Government, and that they would not have been made except for the fact that he was in the service of the Government."

In *Walter F. Brown*, 13 B.T.A. 833 (1928), Petitioner, a Toledo lawyer, was in Washington two weeks each month from May to December, 1921, to carry on work of a congressional committee of which he was chairman and for which he was paid \$7,500.00 a year. He attempted to deduct his travel, hotel and meal expense in Washington as 'away from home expense'. The Court, in allowing the deduction, held:

"This work was not a part of the petitioner's law practice which he carried on in Toledo; it was a service to and for the United States Government performed, and apparently intended by Congress to be performed, in Washington. Nevertheless, it was a part of the petitioner's business, his gainful occupation, during the taxable year."

In *Joseph W. Powell*, 34 B.T.A. 655, the petitioner lived near and conducted his principal business activities in Boston during 1930. He spent 3 days of each week in New York where he managed two corporations, receiving salary of \$20,833.30 from one corporation and a small sum from the other. He attempted to deduct cost of board

and lodging while in New York. The Court in specifically passing upon "pursuit of business", stated:

"His" (the Commissioner's) "point seems to be that the petitioner has not shown that he had any recognized business to which these expenses could be related. However, the evidence shows that the petitioner was earning salaries and other income for services performed in New York while his home and principal place of business was in Boston."

In Donald B. McCruden, 1938 Memo. BTA Decisions 109, (P-H 39068) (1938) petitioner, Secretary of Moody's Investors Service, New York, was appointed financial advisor to the Securities Exchange Commission at \$6,500.00 per year. He received \$15,300.00 per year from Moody. He spent five days per week in Washington for the Securities Exchange Commission, leaving Washington every Saturday to return to New York and going back to Washington on Tuesday. The Court, in allowing deduction for lodging, meals and taxi fares in Washington, stated:

"The employment petitioner accepted in Washington with the Securities and Exchange Commission required that he be away from New York. While the employment in Washington was separate and distinct from the New York employment it was, nevertheless, gainful occupation, business of the petitioner . . . . .

"We, therefore, conclude that all of the expenditures are deductible as expenses in connection with petitioner's business pursuits away from home . . . . ."

From the above quotation it can be seen that these cases, although couched also in terms of principal place of

business, rest in addition upon a finding of "pursuit of business". Indeed, absent such a determination, the deductions could not have been allowed.

The double business doctrine of the tax court was specifically recognized in the Barnhill case, *supra*, although deemed inapplicable to the facts of that case.

It is respectfully submitted that the Circuit Court misconstrued the effect of the O'Hara case, *supra*. Although that case denied the *applicability* of the double business doctrine, it *did not question its existence*. There the taxpayer devoted only Saturdays and Sundays to her law practice in Wilkes-Barre and made only \$1,800.00 in 1940 and \$250.00 in 1941, whereas she made \$10,000.00 per year at Harrisburg and spent the remaining time there. She was forbidden deduction of living expenses at Harrisburg. The obvious implication of the decision was that, had the factual situation been reversed, the deduction would have been allowed.

That the Court of Appeals misconstrued the double business doctrine is further indicated by its citation of *Bark v. Commissioner*, 6 T.C. 851, and *Johnson v. Commissioner*, 8 T.C. 303, as supporting that doctrine when these are clearly single business location cases.

## (2) *The Flowers Case is Distinguishable*

The Flowers case involved a single business taxpayer who attempted to deduct living expenses incurred at his place of business in Mobile, while he maintained his home in Jackson. A double business situation was not involved. That distinction of fact, we realize, does not necessarily mean a distinction in law. But the Tax Court, in the decisions hereinabove referred to, has very evidently

thought that the distinction was sufficient, particularly in view of the fact that it expressly distinguished the Bixler case.

It is to be noted that Flowers and Bixler factually stand in identical shoes. Indeed, although later Tax Court cases have coined a phrase to describe the end result of the Bixler case as based upon a definition of "home", a careful analysis will reveal that the Bixler case determined also that the requisite relationship between expense and business was lacking, so that not only is the Bixler case factually identical with the Flowers case but it is also alike in legal rationale. If this be true, the inference is strong that if this Court had before it in the Flowers case a double business situation such as was presented to the Tax Court in the Jackling, Brown, Powell and McCruden cases, the result may well have been different.

In any event this Court did not have before it in the Flowers case the double business type of situation existing here nor has any other court, to our knowledge, based its decision on a situation factually similar to the Tax Court double business cases above referred to.

The broad observations of the Flowers case were, of necessity, propounded with reference to the factual situation existing in that case. The ruling that one may not deduct living expenses incurred at a single place of business in no way carries the implication that they might not be allowed had they been incurred as a result of having two places of business. The only possibly enlightening remark in the Flowers case, with reference to such a situation, is this statement: "The railroad did not require him to travel on business from Jackson to Mobile or to main-

*tain living quarters in both cities."* Rhetorically we ask, what difference can it make if the employee is required to live in two cities by one employer *or two*; and why may not a taxpayer be required just as much to live in two cities by the exigencies of two employments as he might be if required so to do by one employer?

It may be true that Ney was not required to live in hotels to pursue the business of the Boston Store in Fort Smith. It may further be true that the Office of Price Administration did not require him to live in hotels in order to pursue its business and that it was a matter of indifference to the Office of Price Administration as to where Mr. Ney lived. But the fact that Ney already had one permanent business where he maintained his home and family did require him to spend money for meals and lodging in Washington in order to, and solely in order to, create that additional income.

It certainly cannot be stated that Mr. Ney maintained hotel rooms in Washington for personal reasons; he maintained those rooms, in addition to his family home, solely in order to do the work which the Government required him to do and to perform the other duties required of him.

When a taxpayer has one place of business it may be that he does not incur living expenses in order to create that income or pursue that business, but when he already has one home and one business, we submit that of necessity the living expenses at the second place are incurred in order to and for the purpose of creating additional income of pursuing that additional business, and for that purpose only.

It is to be recalled that travel expenses in pursuit of business are, after all, merely one specific type of business expense, so specifically included in the statute not because travel expenses do not constitute a type of allowable business expense, but to make certain that they would at all events be included under the general clause allowing ordinary and necessary expenses in carrying on business. A claim for the deduction as a specific type of business expense, i. e. travel expense, is necessarily a claim for deduction as a business expense under the general clause. This thought, we submit, additionally emphasizes that the expenses at the second place of business are incurred in pursuit of business.

This is a question of importance which should be settled by this Court.

Alternatively, we wish to call the Court's attention to the fact that Mr. Ney testified that the hotel room was obtained also in order to serve his Fort Smith business, being particularly advantageous for keeping in touch with it and having conferences with his chief executives, and that, as a matter of fact, an extra bed was maintained for the accommodation of such executives when they came to Washington for such conferences (R.25-26).

It is true the Government moved to strike such testimony as not being within the ambit for the claim for refund. The trial court, although stating he understood the objection and he understood the testimony, made no ruling as to whether or not such testimony was within the boundaries of the claim for refund (R.32).

We take it for granted that the Government does not contend that so much of the expenses as might be at-

tributable to the above purposes are not in fact allowable as a business expense if they were properly presented. The claim for refund stated that the claim was for living expenses incurred by reason of having to maintain separate residences as the result of being employed by the Office of Price Administration (R.16, 77-91). While the claim was, perhaps, in lay language, it was hardly misunderstood by the Government. Note the disallowance of the claims (R. 16, 95) as a deduction for "living and traveling expense". The facts as evidenced by the claim for refund and its exhibits were clear, namely, that Ney had one permanent home and business and was claiming deductions because he had to expend money for meals and lodging while working for the Office of Price Administration. It has been held, where all the material facts are set forth in the claim for refund, it is immaterial if the legal theory on which relief is asked is not set forth, *Warner v. Walsh, Collector of Internal Revenue*, 6 A.F.T.R. 574, 24 Fed. (2d), 449. It is not even material if the wrong theory is set forth, *Wunderle v. McCaughan*, 38 Fed. (2d) 258. But in this case there was not even any deviation in legal theory. The claim was founded on deduction as a business expense, the use of the phrase "living expense" to the contrary notwithstanding, *Chester D. Griesemer, supra*. The claim so based on the theory of business expenses, when evaluated in the light of the facts presented in the claim, for meals and lodging incurred while working for another employer away from the permanent home and place of business could be sustained because (1) the expenses so incurred were in pursuit of the Fort Smith business; (2) the expenses were incurred in pursuit of the Washington business; or (3) the expenses were incurred in pursuit and because of both businesses. To deny deductibility here on the theory that this was not within the claim for refund would be to deny deductibility not because the legal theory was not stated,

and not because the all essential facts were not stated, but simply because all potential applications of those facts in connection with that legal theory were not expressly and precisely set forth. We do not believe that an "i" has to be dotted nor a "t" to be crossed to such an extent.

*D. The Distinction Between "Temporary" and  
"Indeterminate" is Unsound*

The Tax Court has adopted a distinction allowing the deductions when employment away from the taxpayer's actual residence was temporary (Harry F. Schurer, 3 T.C. 544, 1944), but disallowing them when the employment away from the actual residence was "indeterminate", Arnold P. Bark, 6 T.C. 851, (see also John T. Johnson, 8 T.C. 303), a distinction inferentially adopted by the trial court and appellate court here and threading a confused course through other decisions.

There has been a complete failure, not only in the Tax Court but in other Courts, to make a clear distinction between the requirement that the expense must be "away from home" and the requirement that it must be in "pursuit of business". In fact, it is suggested that the artificial construction of the word "home" as meaning "place of duty" has at its foundation a substitution of the test of whether an expense is in pursuit of business for the test of whether it is away from home.

We submit that the distinction between "temporary" and "indeterminate" is likewise erroneously founded on confusion of the basic tests. If the distinction is to have any significance, we suppose it will be significant only in determining the existence of one of the two requirements, "away from home" or "pursuit of business," and not

both. Yet, upon analysis it will appear that the distinction cannot properly apply to either.

Let us assume for the moment that "home" does mean "residence". If a man with a single business is allowed a deduction while he is temporarily away from his residence it can only be because he is in pursuit of business. It is submitted that he is no less in pursuit of business if he is indeterminately away from his residence.

Let us next assume that contrary construction, namely, that "home" means "place of business". If a taxpayer, such as the plumber in the Schurer case, goes away from his family home temporarily, if the deduction is allowed, it must of necessity mean that the Court has found (1) he is away from his home, and (2) that he is in pursuit of business. Again we suggest that the element of time has nothing to do with pursuit of business. Whether the taxpayer is temporarily or indeterminately away from his place of business, if he is pursuing business when temporarily away, he is still pursuing business when indeterminately away.

Thus by the above simple analysis, it would seem that the distinction between "temporary" and "indeterminate" can have no bearing on "pursuit of business". Whatever the meaning of home, if we assume that the particular expense is required for business reasons, it is just as much required if the taxpayer is temporarily or indeterminately employed.

By elimination, therefore, if a distinction grounded upon a temporal basis is to have any meaning, it must be utilized to resolve whether the taxpayer is "away from home". It is to be recalled that the distinction was formu-

lated and primarily followed by The Tax Court, which has consistently held that "home" means "place of business". Yet since Schurer and others like him had only a single business—and that he carried with him—he could not be "away from home" since, by hypothesis, "home" means "place of business". Nevertheless, the deduction was allowed Schurer. It is rather obvious, therefore, that The Tax Court (and other Courts who have impliedly or expressly adopted its distinction between "temporary" and "indeterminate") having likewise adopted the construction that "home" means "place of business" have formulated rules of decision which are patently self-contradictory.

Under the foregoing analysis we submit that the distinction, resting as it does on a confused and contradictory basis, cannot be considered an impelling one.

We submit that there is *nothing* whatsoever in the statute which requires that a taxpayer be temporarily away from home; it merely requires that he be away from home. It is true that a taxpayer might stay so long away from home that he has lost that home—because he thereby evidences an intent to abandon it and adopt a new one—but we question whether the point at which this loss occurs is resolved by refinement between "temporary" and "indeterminate".

We are constrained to repeat that the normal and natural meaning of "home" is "family residence" and certainly there is no question that Mr. Ney, whether he were away temporarily or indeterminately, had in any sense of the word forsworn that permanent home. Certainly, and in any event, we submit that the distinction cannot be utilized in this particular case where, whether

"home" means "home" or "place of business", it is obvious that this particular taxpayer had never lost or abandoned it.

*(1) Even if the Employment Was "Indeterminate"  
Rather than "Temporary", Petitioner's Expenses  
While His Employment Was Temporary and  
Until it Became Indeterminate are Deductible*

The trial court found (R.13) that Ney's employment was originally temporary and became "indeterminate". Although we shall indicate hereinafter that this was a determination of an ultimate fact, reviewable on appeal, and although we contend that Ney had merely a series of temporary assignments, we shall here assume that in any event that finding will remain unshaken.

It is significant to note that no court, even those accepting the distinction between "temporary" and "indeterminate", has ever specifically passed on the question of whether or not the expenses of an originally temporary employment but ultimately indeterminate employment are deductible for the period of such employment was temporary and before it became indeterminate. We specifically raise that question.

The Bark case, *supra*, although formulating the distinction, did not pass on this question. Only the income for the year 1941 was before that Court and it did not pass upon the question of whether the expenses for the years 1939 and 1940 were deductible. The Court stated:

"Although the petitioner well understood when he accepted the first employment with the Midvale

Co., that it was to be for a period of only three or four months, the situation was vastly different so far as it relates to the year 1941. What was originally temporary employment had by 1941 become employment of 'indeterminate' duration."

"Temporary" does glide into and become "indeterminate" by insensible degree. To say that the deductions are allowable if the employment is temporary, but are not allowable if "indeterminate", carries with it the necessary, inevitable and logical conclusion that so long as that employment is temporary and until it becomes "indeterminate", those expenses are deductible.

Otherwise, assuming in any particular case that 12 months employment is temporary and that 12 months and a day is "indeterminate" (or that 18 months is temporary and 18 months and a day is indeterminate), a taxpayer would, merely by staying an additional 24 hours or whatever period is required to transmute a temporary position to an indeterminate one, lose the entire benefit of the deduction for expenses while the employment was concededly temporary; and this even though, had he stayed for only the concededly temporary period, the expenses would have been admittedly deductible!

We do not believe that such an illogical distinction was intended to be made or has yet been made by the courts. We submit that the distinction that is proper, if there is to be a distinction between "temporary" and "indeterminate", is this: where an employment not originally indeterminate but temporary becomes indeterminate, the expenses of such an employment, up to the point where it leaves the category of "temporary", are deductible and thereafter only are not deductible. When the temporary period in this case ended is, we think, a question of law

on undisputed facts; but if it is not the case should be remanded to the District Court to determine the exact length of that temporary period.

**E. *Whether the Requirements of Section 23(a)(1)(A) Have Been Met, Under Undisputed Evidence, is a Question of Law***

The Court of Appeals seemed to treat the finding of the lower court as to "home", "principal place of business", "pursuit of business", "temporary", as findings of fact which, unless clearly erroneous, could not be disturbed on appeal.

We submit that where, as here, the evidence is undisputed, the question of whether those facts establish an ultimate fact, if a question of fact at all, is one in the nature of a question of law. The finding of the trial court was merely as to the legal effect of undisputed facts, a finding of ultimate facts. Note in this connection that the court itself remarked that it was not much question of fact "but considerable question as to inferences to be drawn from the facts, legal inferences particularly". (234)

It is, of course, well established that where the evidence is undisputed a question of law arises which is reviewable on appeal. *U. S. Fidelity and Guaranty Company v. Wyer*, 60 Fed. (2d) 856, cer den. *Wyer v. U. S. Fidelity and Guaranty Company*, 287 U.S. 647, 77 L. Ed. 560. Where the conclusion of the lower court depends on the legal effect of undisputed facts the reviewing court may examine the facts and determine their legal effect for itself, *Kaufman v. Commissioner*, 44 Fed. (2d) 144. Whether certain facts establish an ultimate fact, if a question of fact at all, is one in the nature of a question of law, *U. S. v. Pugh*, 99 U.S. 265, 25 L. Ed. 322, aff. *Pugh v.*

*U. S.*, 10 Ct. Cl. 274; *Baumgartner v. U. S.*, 322 U.S. 665, 671. It has even been held where facts are not in dispute and the problem is one of construction, such as the application of a taxing statute and where the ultimate finding is a conclusion of law or at least a determination of mixed questions of law and fact, it is subject to judicial review, and on such review the appellate court may substitute its judgment for that of the trial court. *Exmoor Country Club v. U. S.*, 119 Fed. (2d) 961, and see *Bogardus v. Commissioner*, 302 U.S. 34, 82 L. Ed. 32; *Helvering v. Rankin*, 295 U.S. 123, 79 L. Ed. 1343.

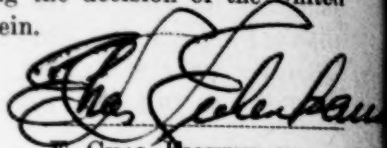
## II *The Deductions are Allowable under Section 23(a)(2) Internal Revenue Code*

We have heretofore assigned error on the basis that this claim is allowable under Section 23(a)(2). We recognize that the leading case, *McDonald v. Commissioner*, 323 U.S. 57, disallowed the deduction there claimed not because of the type of income—business or non-business—to which the expenses related because there did not exist the requisite relationship between the income produced and the expense incurred.

However, whether or not that case requires deductibility here under Section 23(a)(2), we think that it particularly bolsters our contention here that the expenses of Ney were made in pursuit of business under Section 23(a)(1)(A). The deduction of the expenses in the McDonald case were disallowed because they were not incurred in carrying on McDonald's business of judging but in attempting to carry it on. We suggest that the implication of that case requires allowance of the deduction claimed in this case if incurred while engaged in carrying on two businesses and not merely attempting to do so.

## CONCLUSION

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a writ of certiorari and thereafter reviewing and reversing the decision of the United States Court of Appeals herein.



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